

STATE OF MICHIGAN
COURT OF APPEALS

WAYNE COTTRILL, Individually and as Next
Friend of JEREMY COTTRILL, and SALLY
COTTRILL,

Plaintiffs,

and

SALLY COTTRILL as Next Friend of ANTHONY
KELSEY,

Plaintiff-Appellant,

v

CRAIG KENNETH SENTER,

Defendant-Appellee,

and

FENTON LANES INC.,

Defendant.

UNPUBLISHED

June 23, 2009

No. 285216

Genesee Circuit Court

LC No. 06-084724-NI

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent and conclude that plaintiff suffered a serious impairment of a body function as defined by MCL 500.3135(7).

In this case, defendant, a drunk driver with a blood alcohol of .30, crossed the centerline at high speed and struck the car in which plaintiff, an eleven year old boy was a passenger. Plaintiff lost consciousness for a short period. He was taken to the hospital emergency department following the accident and treated thereafter by an orthopedic specialist and his pediatrician. He was initially diagnosed with a left distal ulna (wrist) fracture, a left hand fracture, and three foot fractures. One of the foot fractures was comminuted and shortened.

Later, he was seen for difficulty breathing at which time he was diagnosed with rib fractures caused by the crash.

Plaintiff's arm and his foot were both casted. He was prescribed household and attendant care services for one month. His physician barred him from any use of the right foot or left arm for one month and restricted plaintiff from any weight bearing on the right leg, preventing him from walking. He was permitted to start weight bearing one month following the crash, but was not permitted to run or participate in sports for a longer period. Plaintiff missed two months of school as a result of his injuries. He was not permitted to play football in the 2006-2007 season although plaintiff was hopeful that he would be able to play the next year. At his deposition he reported that although he no longer had pain in his foot or arm, he continued to have pain from his rib fractures.

MCL 500.3135(1) provides that a person remains subject to tort liability for noneconomic loss caused by his use of a motor vehicle if the injured person has suffered a serious impairment of body function. MCL 500.3135(7) defines "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his normal life."

Plaintiff's multiple fractures were objectively manifested per imaging studies and his physician's observations and testing. His inability to walk and perform other basic activities of living were objectively manifested and constituted impairments of important body functions. He was unable to walk or use his left arm for over one month, unable to attend school for two months and for a longer period was unable to participate in sports and recreational activities normal for children. Thus, I would conclude that his general ability to lead his normal life was affected. In addressing this issue, we are to consider "how [plaintiff's] life has been affected, by how much, and for how long." *Kreiner v Fischer*, 471 Mich 109, 131; 683 NW2d 611 (2004). The *Kreiner* Court went on to state that "specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life" and "that the duration of the impairment is short does not necessarily preclude a finding of a serious impairment of a body function." *Id.* at 131, 134. Further, the Court noted that a "de minimus effect would not, as objectively viewed, affect the plaintiff's "general ability to lead his [normal] life" and that the effect must be more than a mere "minor interruption." *Id.* at 130, 133. In *Nicke v Miller*, 477 Mich 954; 723 NW2d 908(2006) the Supreme Court further addressed the issue of duration of the impairment, holding that "an impairment that satisfies the *Kreiner* standard need not be permanent or of any particular duration." *Id.*

While it appears that plaintiff has largely recovered from his injuries, he was unable to walk or use his left arm for at least one month and unable to participate in running or sporting activities for an extended period of time. He also missed two months of school, which is a significant period of time in the life of an eleven year old and his family. Being unable to walk and use one arm as well as being limited by rib fractures undoubtedly affects the ability to lead one's normal life and certainly even more so for an active eleven year old. While the duration of these limitations was thankfully limited, the extent of the limitations was substantial and the duration was not de minimis. For these reasons, I conclude that plaintiff did suffer a serious impairment of body function as set forth in MCL 500.3135(7) and would reverse the trial court.

/s/ Douglas B. Shapiro